IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 7110 of 2002
with
SPECIAL CIVIL APPLICATION No 7244 of 2002
to
SPECIAL CIVIL APPLICATION No 7257 of 2002
with
SPECIAL CIVIL APPLICTION No 7834 to 8408 of 2002

For Approval and Signature:

HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE J.M.PANCHAL

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

COMMISSIONER OF INCOME TAX

Versus

MALIK DISCRETIONARY FAMILY TRUST

Appearance:

MR MIHIR J. THAKOR, Sr. Advocate with
MR MANISH R BHATT, Senior Standing Counsel
and Mrs. Mauna M. Bhatt, Advocate for the Petitioner
in all the petitions

MR SN SOPARKAR,Sr. Advocate with Mrs. SWATI SOPARKAR and Ms. V.K. Parikh, Advocate for the Respondent in all the petitions

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CORAM : HON'BLE MR.JUSTICE R.K.ABICHANDANI
and
HON'BLE MR.JUSTICE KSHITIJ R.VYAS
and
HON'BLE MR.JUSTICE J.M.PANCHAL

Date of decision: 17/09/2003

COMMON ORAL JUDGEMENT

(Per : HON'BLE MR.JUSTICE R.K.ABICHANDANI FOR THE COURT)

#. This group of petitions has come up before us pursuant to the order dated 14th August, 2002, made by Division Bench, which did not agree with the view of the another Division Bench in Tax Appeals Nos. 188 to 228 of 2001 to the effect that the income substantively assessed in the hands of the main trust cannot be again assessed in the hands of the beneficiary trusts, and that the appellant did not raise any question of law. The learned Senior Counsel for the petitioner states that the Revenue is in the process of challenging the order of the Division Bench made in those appeals before Hon'ble Supreme Court.

#. So far as this group of petitions is concerned, the Rajkot Bench of Income-tax Appellate Tribunal, by its order dated 24th May, 2002, concluded that the assessment order dated 22nd March, 2000 was not erroneous and prejudicial to the interest of the Revenue and, therefore, the CIT was not justified in exercising powers under Section 263 of the Income-tax Act, and in directing the Assessing Officer to enhance the income of the assessee and to withdraw the refund of tax along with interest.

#. It appears from the record that the CIT (Appeals) was of the view that the interest income which was paid by the main trust to the beneficiary trusts was legally assessable in the hands of the assessee beneficiary trusts which had not opted for KVSS. According to the CIT (Appeals), the income should be assessed in the right hands, which in this case were beneficiary trusts. It also observed that KVSS was used as a "conduit pipe" or a colourable device by the main trust resorting to it for taking undue refund from the Department.

#. The Tribunal held that in the KVSS, the case of the main trust was that interest amount paid by the main

trust to beneficiary trust was offered for tax and, therefore, as per the consistent stand taken by the Tribunal, the income which was included in the hands by the beneficiary trusts by way of protective assessment was to be excluded from the income of the beneficiary trust. In para-13 of its order, the Tribunal noted that right from the beginning the dispute was whether the interest income was to be taxed in the hands of the main trust or in the hands of the beneficiary trusts, i.e. the assessees before it. The Tribunal noted that in the instant case, Samadhan Scheme had intervened, which was a special circumstance which the main trust availed of as it was entitled to do so. It therefore set aside the order of the CIT (Appeals), passed under Section 263 of the Act.

#. During the course of the arguments, the learned Senior Advocate appearing for the petitioner in all these petitions tried to raise a contention that the interest income paid by the main trust to the assessee beneficiary trusts was an interest income in their hands, and irrespective of the fact whether such amount was allowed as a deductible expenditure in the assessment of the main trust it was liable to be taxed in the hands of the assessee beneficiaries. In support of this contention, the learned counsel wanted to rely upon material which was admittedly not placed before the Tribunal, including the assessment order of 1988-89, the appellate order of 1988-89 and the order of the Tribunal of 1988-89 as stated by him. It would be trite thing to say that the material which was not placed before the Tribunal and which may have a bearing on the contention now sought to be raised cannot be looked into for the first time by this Court at this stage. In this view of the matter, the appropriate course appeared to be that the petitioner may approach the Tribunal by way of an application for revising and/or modifying the orders of the Tribunal, raising the new contentions on the basis of the material which they could not earlier bring on the record of the Tribunal in all these matters.

#. The learned Senior counsel for the petitioners submitted that the petitioners would submit a paper book bringing to the notice of the Tribunal the additional material which was relevant, but which could not be brought to its notice during the proceedings before it along with the application for revising or modifying the impugned orders that will be filed by the petitioner. He also submitted that the petitioners would draw the attention of the Tribunal to its judgment rendered on 28th December, 2001, taking a different view on the same

subject. It will be open for the petitioner to make such a move before the Tribunal.

#. Having regard to the fact that the learned Senior Counsel for the petitioner wants to rely on the material not earlier produced before the Tribunal in support of the contention which does not appear to have been specifically raised on the basis of the fresh material which was not produced, it appears to us that it would be appropriate for the petitioner to raise the contentions which are sought to be raised before this Court but were not raised before the Tribunal, in their application for revising and/or modifying the order of the Tribunal along with the fresh material on which the petitioner seeks to rely in support thereof. On such application being made by the petitioner, the Tribunal shall consider the same and after hearing the concerned parties, take a decision thereon in accordance with law. All these petitions stand disposed of accordingly. Rule is therefore discharged in each of them with no order as to costs. Interim relief stands vacated in all these matters.

[R.K. ABICHANDANI, J.]

[K.R. VYAS, J.]

[J.M. PANCHAL, J.]

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